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RECOVERY ON CORPORATE CONTRACT MADE IN CONSIDERATION OF INDEFINITE FUTURE SERVICES BY OFFICER DENIED.

In the case of Alexander v. Equitable Life Assurance Society, decided by the Court of Appeals of New York, not yet reported, the facts were as follows: On November 6, 1888, the defendant company entered into a contract with James W. Alexander as party of the second part, and his wife, the plaintiff, party of the third part, by the terms of which the defendant agreed to pay to Mrs. Alexander, after the death of Mr. Alexander, an annuity of $18,000 during her natural life. Mr. Alexander died September 11, 1915. The defendant refused to pay the annuity, and this action was brought to recover installments alleged to be due under the contract.

At the trial the plaintiff put in evidence the contract, a resolution of the finance committee of the defendant and an admission that at the date of the contract the plaintiff and James W. Alexander were husband and wife, and continued to be until the death of Mr. Alexander; also an admission that at the time the contract was executed, and for some time prior and subsequent thereto, Mr. Alexander was vice-president and director of the defendant, and continued as such until 1899, when he became president, and continued as such, until 1905, when he resigned and ceased to have any further connection with the defendant as officer or employee. The plaintiff then rested. A motion for dismissal of the complaint on the ground that the plaintiff had failed to prove a cause of action was denied, and there was judgment for the plaintiff.

The resolution, which the contract referred to and made a part thereof, recited that it was in consideration of services Mr. Alexander had rendered the defendant and which he would be called upon to render in the future, outside of services covered by his salary.

The Court held that the fact that the contract called for rendition of extra services in the future and no proof of them having been offered or that he was ready and willing to render them was a bar to recovery under the contract; that the contract was an extraordinary one, and the plaintiff, in view of the fact that her husband was an officer of the defendant, was required to prove that the past services were of such a character and rendered under such conditions as imposed a legal obligation on the company therefor; that the fact that the contract was under seal was not enough of itself to impart a sufficient consideration; and that such a contract for indefinite and uncertain services or their value, was beyond the power of the company under its charter and by-laws to make.

Although there was nothing in the contract by which Mr. Alexander expressly obligated himself to render any services in the future, that was an implied part of the contract. It was said that the resolution as well as the contract indicated that the defendant, by the payment of such a large sum of money, expected to secure the benefit of Mr. Alexander's services in the future as it had in the past, and that he intended to render such services. The plaintiff stood in the same position that Mr. Alexander would had he been attempting to enforce the contract. She took it subject to all the burdens he would have had if the promise had been to pay him, instead of her, an annuity during his life. The Court stated that the plaintiff was also required to prove *prima facie*, that as to the past services they were of a character and rendered under such conditions as imposed a

legal obligation on the defendant to pay therefor. In this connection, it must be noticed, that at the time the past services were rendered, Mr. Alexander was a director and officer of the defendant. The general rule is that in the absence of an expressed contract an officer or director of a corporation cannot recover for services rendered without proving they were outside of his duties as such officer or director, and in addition thereto that the same were rendered with the expectation by both parties that they should be paid for.

NOTES OF IMPORTANT DECISIONS.

MERE POSSESSION OF LIQUOR HELD NO OFFENSE.—The case of United States v. Dowling, 278 Fed. 630, decided by the District Court of the Southern District of Florida, holds that the National Prohibition Act does not make the mere possesion of intoxicating liquor a crime. It further holds that a law making possession a crime, would not be within the power of congress to legislate for the enforcement of the Eighteenth Amendment, unless for the purpose of rendering effective the prohibition of manufacture, sale, transportation, importation, or exportation contained in the amendment and appropriate to that end.

A portion of the Court's opinion is as follows:

"This amendment is at once the law forbidding the manufacture, sale, transportation, importation, and exportation of intoxicating liquors for beverage purposes, and at the same time it is a grant of plenary power to the Congress to enact legislation appropriate for its enforcement. The amendment does not proprio vigore provide the means for making it effective that duty is conferred upon the Congress, and within the scope of the amendment the legislative branch can enact such laws as it may deem proper. Of course the Congress cannot transcend the fundamental law or the delegated power. The amendment does not authorize the Congress to so legislate as to denounce the bare intrastate possession of intoxicating liquors. To do this would be an illegal protrusion. The words, "for beverage purposes," of the amendment, are as plain and important as any other words of the amendment, and they are inseparable from the other words. They qualify "manufacture," "sale," "transportation," "importation," and "exportation."

"However, I think the Congress has the power to prohibit the possession of intoxicating liquors, if the possession is inhibited for the purpose of rendering effective the expressed prohibitions of the amendment; but the Congress cannot do so for the purpose of adding a new prohibited act to the fundamental law. It is clear that the Congress is without authority to make the mere possession of intoxicating liquors—possession stripped of every other fact or incident—a crime. The amendment neither by expression nor implications denouces the simple possession of intoxicating liquors. The possession is lawful, unless it be coupled with the illegal "manufacture" or "sale" or "transportation" or "importation" or "exportation."

"I am not advised that any court has passed directly upon this question but I think the decision in U. S. v. Jin Fuey Moy,241 U. S. 394, loc. cit. 401, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854, is at least persuasive, if not conclusive, of the correctness of the view above advanced. There the court said:

" 'If Opium is produced in any of the States, obviously the gravest question of power would be raised by an attempt of Congress to make possession of such opium a crime.'

"Of course the Eighteenth Amendment does not apply to opium; but, as it has been said, the amendment does not denounce as unlawful mere possession of intoxicating liquors, nor does the language of the amendment authorize the Congress to make the mere possession of intoxicating liquors a crime, as I have attempted to show."

STATUTE RELATING TO RIGHTS OF SURVIVOR OF JOINT DEPOSITORS HELD VALID.—The New York banking law, providing that the making of a savings deposit in the name of depositor and another in form to be paid either or the survivor shall, in the absence of fraud or undue influence, be conclusive evidence, in any action to which the bank or the surviving depositor is a party, of the intention of both depositors to vest the title in the survivor; is held in Heiner vs. Greenwich Savings Bank, 193 N. Y. Supp. 291, not to take property without due process of law. In this respect the court in part said:

"It seems to me, therefore, that if this statute be construed as a rule of substantive law, it does not deprive a party of his property without due process of law. The provision is not altogether clear, but refers, I think, exclusively to an action where one of the parties named in the account is dead. During the lifetime of both of the depositors either one would have the right to establish the real fact, whatever it might be, with reference to the account, and would have the right to bring action in respect of that. He thus has an oportunity for his day in court, and through him his personal representatives would have their day. The statute may be upheld on another basis. The Legislature has the power to limit remedies. Under this statute it may be said that the remedy for a claim that the account is not what it

purports to be must be pursued during the lifetime of one of the depositors. It may be construed to be of the nature of a statute of limitation. As shown above, this would not be a taking of property without due process of law, because during his lifetime the decedent could have sued with reference to the account."

RECENT DECISIONS IN THE BRITISH COURTS.

Another interesting question from a commercial point of view was decided in French & Co. v. Leeston Shipping Co., 38 T. L. R. 159. A time charter had been obtained for a ship and during the currency of the charter the ship was sold. The brokers made a claim for commission, but it was held that in the case of a charter party containing a provision for payment of commission on hire paid and earned under the charter party, there is no implied term that the shipowners must not put an end to the charter party by agreement, by selling the ship during the currency of the charter, and it was held that action for payment of commission on the opposite assumption failed.

The case of Tervaete, 38 T. L. R. 460, lays down an important principle with regard to maritime lien. The decision is that although where a vessel belonging to a sovereign owner negligently causes damage by collision, that owner cannot be impleaded directly or indirectly, nevertheless a maritime lien attaches, and if the vessel is afterwards transferred to an individual owner the lien may be enforced against such individual owner by judicial process.

The facts in the case of H. M. S. Daffodil are interesting. The commander, officers and crew of a warship having rendered services to a merchant vessel, instructed the defendants, a firm of navy agents, to prosecute a claim for salvage. The defendants were advised by counsel that the claim against the ship was hopeless because she had become a total loss before being got into final safety, and that as to the salved cargo, apart from the difficulties of appraisement of a dispersed cargo, the claim had been lost by not taking the necessary steps at the time of the services to obtain a bond before the goods were dispersed. On this advice and against the express prohibition of the claimants, the defendants settled the claim for £100. In an action of damages for negligence and breach of duty against the defendants, it was held that the authority of a ship's agent was not wider than that of a solicitor and does not extend to settlement on terms forbidden by the principal, and that the defendants having been guilty of a breach of duty in settling for £100 against the express prohibition, were liable in damages based on the difference between the settlement and the amount which would have been awarded had the case been carried to judgment.

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FEDERAL EXECUTIVE POWER.*

The public gaze has been fixed perhaps more directly and more intently on the heads of governments since 1914 than in any previous era of history. Our own country is no exception. The war mind with us, however, has merely accentuated a tendency which had existed long previously.

One of the marked features of our politics during the past forty years has been the increasing feeling that the Federal government is conducted better than the State governments. The consequence has been growth in the variety of types and in the extent of appeals to the Federal government to exercise its powers; to take in charge matters formerly left chiefly or exclusively to the States. The legality of the employment by the Federal government of the authority invoked has been assumed—or at least has given little concern. A characteristic of the period almost equally marked has been the greater frequency with which application for relief has been to the President rather than to the Congress.

Lord Bryce in *Modern Democracies* [1] says of the executive that "The world asks today, not how far that branch of government hankers after mastery but—how far is it an efficient servant, capable and honest?" In 1888 the author of the *American Commonwealth* [2] said that "The domestic authority of the President is in time of peace very small." Twenty-five years later an ex-President—describing his own administration during which there was no war—

*Annual Address before the Alabama State Bar Association at Birmingham, Alabama, April 28, 1922, by Francis G. Caffey.

(1) II, 358.

(2) I, 50.

said [3] that he had insisted on the theory that "the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress under its Constitutional powers."

The apparent lack of popular appreciation of the importance of considering where power lies of right, as well as the wide divergence of view among lay publicists of high rank, imposes a peculiar duty upon the legal profession. From the foundation of the government it has been the part of American lawyers to lead in keeping public activities within constitutional limits. Never was this obligation greater than it is today.

When the colonies revolted resentment against the king was intense. In the Articles of Confederation the executive was therefore made the creature and agent of the legislature. Experience demonstrated the mistake. Accordingly, the first resolution of the Constitutional Convention in committee of the whole was "that a national government ought to be established, consisting of a supreme legislative, judiciary, and executive."[4]

A group, led by Roger Sherman, desired the executive to be appointed by, to derive its power from and to be controlled by the legislature. Another group, led by Alexander Hamilton, wished a completely separate executive, with authority to nullify any legislation proposed. Fortunately neither extreme prevailed. The scheme of a third group, led by James Madison, was adopted. There was established a single elective executive, with independent powers not subject to review by any other branch of the government, with limited participation in legislation, requiring legislative approval in the exercise of some of his authority, and finally subject to impeachment after trial participated in by the legislative and judicial branches.

The President alone of Federal executive officials is elected. The functions of the Vice-President are exclusively legislative—unless he succeed to the Presidential office itself. The sole opportunity of the people to participate directly in the selection of the personnel of the executive department of the government is when they cast their ballots in Presidential elections.

As matter of legal theory, as well as in fact, the legislative possesses greater power than any other department of the government. The judicial "is the weakest for the purposes of self protection and for the enforcement of the powers which it exercises."[5] The executive stands between. Our constitutional system has been a growth. What are now the relative positions of authority of the three branches is a result. But it should be realized that the fathers designed the executive to be strong. The President should and does possess a vast range of authority. His office has reached a stage, as has the country itself, far beyond what was ever dreamed of in 1789. A correct appraisal of the present executive domain in our democratic institution is as essential as is recognition of the parts which the legislature and the judiciary are entitled to play. It is a prerequisite to the sane decision of governmental problems.

The first section of Article II of the Constitution provides that "The executive power shall be vested in a President of the United States of America." In the same article are granted certain specific executive powers. Chief among them are those relating to appointments, enforcement of the laws, pardons, command of the army and navy, conduct of international relations.

It is a striking circumstance that without exception each authority conferred is substantially identical with that which prior to the Revolution had been exercised by the king of England. The principal differences are that the President is chosen by the people—not hereditary; that his powers are defined by a written document—not by custom; that there are adequate restraints through enforced co-ordination with others. While these differences are vital, the simi-

(3) Roosevelt, Autobiography, 388-9.
(4) 1 Elliot's Debates, 151.
(5) In re Neagle, 135 U. S. 1, 63.

larity of types makes essential resort to precedents of the mother country in the interpretation of our own executive law. This is abundantly illustrated in the decisions of the Supreme Court. For example, in discussing the pardoning power, it has said [6] "the language used in the constitution, conferring the power to grant reprieves and pardons, must be construed with reference to its meaning at the time of its adoption. At the time of our separation from Great Britain, that power had been exercised by the king as the chief executive. Prior to the Revolution, the colonies, being in effect under the laws of England, were accustomed to the exercise of it in the various forms, as they may be found in the English law books. They were, of course, to be applied as occasions occurred, and they constituted a part of the jurisprudence of Anglo-America. At the time of the adoption of the constitution, American statesmen were conversant with the laws of England, and familiar with the prerogatives exercised by the crown. Hence, when the words to grant pardons were used in the constitution, they conveyed to the mind the authority as exercised by the English crown, or by its representatives in the colonies. At that time both Englishmen and Americans attached the same meaning to the word pardon. In the convention which framed the constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment. We must then give the word the same meaning as prevailed here and in England at the time it found a place in the constitution."

By virtue of the Constitution itself the President has control of a vast organization of civil employees—grown from less than 500 Presidential appointees in the time of Jefferson [7] to upwards of 15,000 Presidential appointees, and more than 568,000 of all classes, on December 31, 1921. This is maintained through his authority to make appointments and removals. Closely associated are his powers to fill vacancies happening during the recess of the Senate and to commission all officers of the United States.

Congress may vest the appointment of inferior officers in the President alone, in the courts or in members of the cabinet. All other officers of the United States, including ambassadors, public ministers, consuls and Supreme Court judges, are required to be appointed by the President with the consent of the Senate. Accordingly, the Senate has the legal right to share in appointments to the extent of giving or withholding approval of those whose nominations must be submitted to it. Periodically it has asserted the claim that it is entitled to be consulted in advance of nominations. This contention has found less and less acceptance with the progress of time. It may now be regarded as abandoned. In practice, to be sure, both Senators and Congressmen participate in the choice of the personnel of the executive branch. But that participation is not predicated upon a right. Moreover, it is bound to diminish if the competitive principle in the civil service be—as it seems likely to be—extended and public opinion force firmer adherence to it.

We are accustomed to hearing the appointments of various officials ascribed to Senators or members of the House. While the actual selections are frequently made by legislators, in form they only recommend. The President may always decline to accept or act upon their recommendations. In him and in him alone is vested the power of nomination—the initiative in making appointments. The Senate by refusing confirmations, and the Congress by withholding appropriations or by other method of embarrassment, may influence him; but the Constitution expressly lodges in him the power to appoint all executive officials except those who come within the somewhat vague constitutional class of "inferior officers."

(6) Ex parte William Wells, 18 How. 307, 311.
(7) Hart, Actual Government, 284.

The Constitution does not prescribe the titles, number, qualifications or duties of those who shall compose the executive department. Congress is authorized to fix and alter these at will. The President is the only executive official specifically designated in the Constitution. It refers twice to principal officers or heads of departments. It authorizes the President to require of them written opinions and Congress to empower them to make appointments to inferior offices. It was thus contemplated, but not expressly provided, that there shall be a cabinet.

Having established the offices, the legal power of Congress is ended—save that the Senate's approval of the selections is necessary in certain cases. Congress has sometimes maintained that it is entitled to prohibit discharges from offices of the latter class. In 1789 one of the notable debates was on this subject. When the bill creating the department of foreign affairs was under consideration effort was made to employ phraseology which implied that the President derived his power of removal from legislation.[8] The theory was vigorously opposed, with the result that Congress recognized that removal was exclusively an executive function. This status continued until the Civil War. But as an incident to the quarrel between Congress and President Johnson the Tenure of Office Act was passed in 1867.[9] In substance this denied the President authority to remove without its consent civil officials appointed upon concurrence of the Senate. The restriction was modified in 1869[10] and wholly repealed in 1887.[11] While the prohibition was in existence there was no actual test of its validity. Having receded from its position and resumed the attitude which had prevailed from the foundation of the government to the Civil War, the conduct of Congress may be taken as its own interpretation that it is without authority to limit the President's prerogative of removal. On principle this is clearly the proper view; and the Supreme Court has expressly sanctioned the doctrine that long acquiesence by Congress is of itself adequate basis for assuming the existence of power exercised by the executive.[12]

In the early history of the government it was even contended that the President did not have power to remove a cabinet officer; also that Congress, under its express authority to confer upon heads of departments power to appoint inferior officers, might put appointees of this class beyond the control of the President. The actions of President John Adams in dismissing Timothy Pickering as Secretary of State and of President Jackson in dismissing William J. Duane as Secretary of the Treasury settled the authority of the President to remove cabinet officers. It is indubitable that a cabinet officer must take directions from the President under pain of dismissal if he disobey. Thus the President has effective control over the appointees of heads of departments and hence of all executive officials of the government—except a small group which Congress may lawfully empower the courts to appoint, who to all intents and purposes are in the judicial branch of the government.

It has sometimes been assumed that classified civil service employees may not be removed by the President. That is believed to be an error. The statutes and regulations prohibit severance from the service for a religious or political reason or without opportunity to answer written charges.[13] These are binding upon subordinate officials. Morally they are obligatory also upon the President himself. But if one be discharged by or at his direction there is no enforcible legal remedy. In addition, as matter of practice, by demotion civil service officials may be driven into retirement.

(8) Maclay, Debates of United States Senate, ed. by Harris, 104-114.
(9) 14 Stat. 430.
(10) 16 Stat. 6.
(11) 24 Stat. 500.
(12) United States v. Midwest Oil Co., 236 U. S. 459.
(13) 22 Stat. 403; 37 Stat. 555.

The courts have frequently held that they are without jurisdiction to inquire into the propriety of the action of the President.[14] Where, however, without his sanction some lesser appointing authority makes a removal in violation of statute or regulation, compensation is recoverable,[15] and it is an interesting question for authoritative judicial determination in future whether a mandamus to compel restoration or similar relief may be awarded.[16]

The second great enumerated power of the President is that which requires him to take care that the laws be faithfully executed. This is supplemented by his oath to execute the office of President and to preserve, protect and defend the Constitution. Ex-President Benjamin Harrison[17] called it the "most comprehensive" power of the President.

The right to require executive officials to perform their duties, coupled with the authority to appoint or remove them, makes the position of the President well nigh supreme in matters of administration —supreme in fact save as he may be restrained by the legislative and judicial branches.

The President may issue proclamations, orders or regulations which are binding on his subordinates—unless there be some positive provision of law which is violated by compliance. When in his judgment required he may also employ the army and navy in the enforcement of his wishes. His authority with respect to these matters rests on the Constitution; it is wholly independent of statute.

Illustrations of the exercise of this power are the mass of regulations he prescribes such as govern the customs and internal revenue, the protection of the public domain or other public property, the prevention of physical connection of our shores with foreign countries by bridges, wires, tunnels or otherwise, and the protection against violence of judges or other public officials.

The third great constitutional power of the President is that of issuing reprieves and pardons. It is true that Congress has authority to grant advance amnesty and by that means to compel witnesses to testify,[18] but this is in no respect a limitation upon the executive pardoning power.

Uniformly, the judiciary have recognized that it is beyond their authority to question or to refuse to give effect to an executive pardon. The Supreme Court has said,[19] "To the executive alone is intrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offense pardoned and removes all its penal consequences. It may be granted on conditions. * * * * the legislature cannot change the effect of such a pardon any more than the executive can change a law." Again, the Court said [20] that, with the exception of impeachment, the pardoning power "extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."

Thus in theory the President may empty the prisons and completely nullify any punishment for crime that Congress may prescribe or a Federal court impose.

The fourth great power of the President is complete control of the military establishment. We have had in the World War too recent an example of the extent of that authority under the Constitution to require comment. What occurred then had accurred previously. The vastness of the

(14) See Parsons v. U. S., 167 U. S. 324; Wallace v. U. S., No. 118, October Term, 1921, Supreme Court, February 27, 1922.
(15) U. S. v. Perkins, 116 U. S. 483.
(16) White v. Berry, 171 U. S. 366; Keim v. U. S., 177 U. S. 290.
(17) This Country of Ours, 98.
(18) Brown v. Walker, 161 U. S. 591.
(19) U. S. v. Klein, 13 Wall. 128, 147.
(20) Ex parte Garland, 4 Wall. 333, 380.

power of the President in the conduct of war was first illustrated by Mr. Polk in the Mexican War. In the Civil War Mr. Lincoln carried his office to a still higher point of responsiblity and power. The course of Mr. Wilson was merely an application of constitutional principles, thoroughly established by his predecessors, to a problem more complex than the country had ever before been called on to deal with.

There is no prohibition of the President leaving the territorial limits of the United States. While in office Mr. Roosevelt went to Panama, Mr. Taft to Panama and Mexico,[21] Mr. Wilson to Europe.

The President has authority to take charge of troops in the field. Washington exercised that prerogative in the Whiskey Rebellion of 1794. Western Pennsylvania, where the insurrection prevailed, was less accessible from the seat of government then than France was in 1918.

If the President may go out of the country and may assume immediate direction of the military forces, then it follows that Mr. Wilson would have been within his constitutional rights if in the recent war he had personally commanded our troops in Europe or our naval operations in European waters. This serves to bring home to us how transcendent is the language of the Constitution relating to the commander-in-chief of the army and navy.

Apart from this, in peace time the President is entitled, without hindrance by Congress or the courts, to assign the regular army, or the State militia when called into the service of the United States in the contingencies prescribed by the Constitution, to the localities of his choice and to the duties he deems appropriate. The most frequent illustrations we have had of the exercise of this power are in the prevention of interference with the operations of the government and in suppressing domestic insurrection. Not infrequently the military or naval forces also have been employed on foreign soil or in foreign waters. It is plainly within the constitutional authority of the President to do this. Thus there is within his control the problem of whether the country shall be committed to war.

The President's fifth constitutional power of great scope is to conduct foreign relations. From the inception of the government there has been occasional controversy about the share of the Senate in treaty making and about the extent of the obligation of the House to provide the means for the execution of certain types of treaties. Otherwise there has been substantially no dispute of the plenary nature of the President's control.

While a member of Congress, Chief Justice Marshall said, [22] "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." In the language of Mr. Jefferson,[22a] "The transaction of business with foreign nations is executive altogether."

By the express terms of the Constitution the President must decide what diplomats of other countries will be received by this government. This duty involves the determination of what foreign governments or factions seeking to control them will be recognized.

In the same way, but with the concurrence of the Senate, the President is required to select the personnel of our representatives abroad. In great measure therefore he must shape the direction and the development of our trade. Upon the wisdom of his choices depends very largely our commercial prosperity, as well as the degree to which we shall be free from foreign entanglements.

The assertion by the Senate of its prerogative in treaty making is based upon the provision in the second section of Article II of the Constitution that treaties be made with its advice and consent. It is manifest that the Senate is bound to assume an im-

(21) Taft, Our Chief Magistrate and His Powers, 50-1.

(22) 5 Wheaton's Reports, Appendix, 26.
(22a) Writings, ed. by Ford, V, 161.

portant responsibility. That has never been denied. The issue has usually been as to whether it is entitled to be consulted in advance.

In the early days of the government President Washington appeared on the floor of the Senate, accompanied by General Knox. He went to ask its view concerning the contemplated negotiation of a treaty with the Indians.[23] After considerable discussion the matter was referred to a committee. Alterations were also suggested. The course pursued so irritated the President that, according to an apparently authentic story, as he left the Senate chamber he remarked, "I'll be damned if I ever come here again." And he made good the vow. In no other instance has any President participated in an executive session of the Senate.

In 1846 Mr. Polk, previous to instituting negotiations with Great Britain, by message[24] asked and by equally formal assurance received from the Senate approval of the terms of a proposed convention for the settlement of the Oregon boundary. In a number of cases there has been similar action.[25] But that is the exception. As a rule the President has not conferred with the Senate as such about a treaty prior to submission to it of the completed document. Frequently he has advised with individual Senators or with party leaders or with the Committee on Foreign Affairs. Yet it has never been recognized that the Senate's prerogative comprehends more than a right to say whether it approves a treaty already signed. Today it may be taken as settled that the President has the exclusive function of initiation and of negotiation; that the agents he employs to frame the instrument need not be confirmed; that the Senate may give or refuse or may annex conditions to its assent; also that after the Senate has acted it is the sole province of the President to determine whether by ratification he will put into effect a treaty which the Senate has approved or will undertake to procure an agreement with the other contracting power to meet conditions prescribed by the Senate.

At times it has been urged that when an appropriation or the performance of a promise through legislation is requisite, the Congress should be afforded opportunity to consent or dissent before an international engagement of this type is entered into. Yielding to this insistence would be a rejection of the plain meaning of the Constitution. There can be no doubt that the President and the Senate are by its express language empowered to obligate the country upon any subject which may properly be embraced within a treaty. The House has no legal right to participate in treaty making. True, so far as concerns ourselves domestically an act of Congress may supersede a treaty. True, there is no force that can compel Congress to appropriate money or to take any other step which may be essential to avoid the breach of a treaty. But it is equally sure that the failure of the Congress in this respect externally is not an abrogation nor does it effect a release of the United States; also that the country injured is entitled to a remedy—even to resort to arms for its satisfaction.[26]

Inevitably during the past three years attention has been focussed primarily upon the procedure for making treaties and upon their influence in closing or preventing war. There is another aspect of the treaty power, however, which demands serious thought; which for the future particularly is of grave concern.

There is a field for the application of international arrangements by treaty which as yet has been hardly touched. The scope is almost unlimited. It is believed that the possible effect upon the course of the country hereafter is little realized.

(23) Maclay, 122-126; J. Q. Adams, Memoirs, VI, 427; Corwin, The President's Control of Foreign Relations, 85-8.

(24) Richardson, Messages and Papers of the Presidents, IV, 449.

(25) Foster, Practice of Diplomacy, 263-6; Crandall, Treaties, Their Making and Enforcement, 2d ed., 67-70, 72.

(26) Edye v. Robertson, 112 U. S. 580, 598-9.

A treaty is a part of the law of the land. It is made under the authority of the United States. The States are expressly and wholly prohibited from any part. Many familiar subjects are reserved for exclusive handling by the States. With them, in the absence of treaty, Congress has no power to deal. Yet the Supreme Court has long ago and repeatedly held that when such matters are brought within the provisions of treaties Congress acquires and the States lose the right to legislate concerning them. Both the constitution of and the statutes of a State must give way before a treaty of this kind.

It is of obvious interest to ascertain with precision what are the topics the jurisdiction of which may be thus transferred under the treaty power. The great drift of foreigners to our shores and the tide of events which is apparently sweeping us into new areas of relations with foreign countries enhance this interest.

Already our highest court has settled with respect to numerous matters that by their inclusion in treaties there may be a complete shifting from the State to the Federal domain. Among these, for example, may be cited the confiscation of property of foreigners, [27] the escheat of lands owned by them, [28] the acquisition of land by them, the devolution of land to which they have title,[29] the statute of limitations as it affects their rights,[30] and the regulation of migratory birds.[31]

With the rapid progress of communication and transportation in recent years it is difficult to conceive how wide hereafter may be the range of the exercise of this power. What has happened about rates of common carriers [32] is suggestive. The directions taken by commercial growth have undoubtedly had great influence in the establishment of the relative functions of Congress and the State legislatures today. Conceivably use of the treaty power may follow the trend of the commerce clause.

For the present it is enough to indicate what has been said on the point. The subject is not novel. But the application of admitted power may lead to results which would startle those who do not reflect.

More than a century ago, John C. Calhoun said, [33] "Whatever, then, concerns our foreign relations, whatever requires the consent of another nation, belongs to the treaty power—can only be regulated by it; and it is competent to regulate all such subjects, provided—and here are its true limits—such regulations are not inconsistent with the Constitution. If so, they are void. No treaty can alter the fabric of our government; nor can it do that which the Constitution has expressly forbidden to be done; nor can it do that differently which is directed to be done in a given mode, and all other modes prohibited."

Again, Mr. Calhoun said[34] that the United States "can enter into no stipulation calculated to change the character of the government; or to do that which can only be done by the Constitution-making power: or which is inconsistent with the nature and structure of the government,—or the objects for which it was formed."

There may be surprise that so ardent an advocate of State rights should concede so much. In fact, however, the Supreme Court itself later, in its most frequently repeated statement on the subject, [35] adopted substantially the same view. "The treaty power, as expressed in the Constitution," said the Court, "is in terms unlimited except by those restraints which are found in

(27) Ware v. Hylton, 3 Dall., 199.
(28) Chirac v. Chirac, 2 Wheat. 259.
(29) Hauenstein v. Lynham, 100 U. S. 483; Goefrey v. Riggs, 133 U. S. 258.
(30) Hopkirk v. Bell, 3 Cranch 454; 4 Cranch 164.
(31) Missouri v. Holland, 252 U. S. 416.
(32) Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. Co., No. 206, Oct. T., 1921, Sup. Ct., February 27, 1922.
(33) 4 Elliot's Debates, 464.
(34) Works, I, 204.
(35) Goefrey v. Riggs, 133 U. S. 258, 267.

that instrument against the action of the government or of its departments, and those arising from the nature of the government itself or of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

Recently, in upholding the validity of the treaty, and of the statute to carry out its provisions, for the protection of migratory birds the Court [36] unequivocally negatived the argument that a treaty can not go further than an act of Congress in derogation of the reserved powers of the States. To the contention Mr. Justice Holmes replied,[37] "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. * * * It is obvious that there may be matters of sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found." He added,[38] "No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power. * * * Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State, and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld."

Language could hardly indicate more forcibly the extent of the treaty power. The clear implication is that, except where a limitation is expressed or implied in the Constitution, anything which becomes of international concern[39]—however much previously regarded as a purely domestic affair—immediately by force of a treaty may pass into the realm of exclusive Federal regulation. The possibility of the application of the principle to radio communication and to aerial transportation is apparent. Moreover, as the Supreme Court uniformly has left to the political branches of the government determination of the propriety of governmental action relating to foreign affairs—save only that when an individual right is involved there shall be due process—it is doubtful whether the judiciary will ever declare a treaty invalid upon the ground that the domain of a State has been invaded. A power which the Constitution grants on the one hand is not immediately taken away on the other.[40] By the Constitution[41] the States surrendered to the United States the treaty power in its entirety. As an attribute of sovereignty whatever any nation may do by treaty the United States, unless restrained by the Constitution, may do also by treaty.

That such an internal arrangement for State action as arises from the Tenth Amendment should be sufficient to restrict the nation in international affairs would seem inconsistent with doctrines to which

(36) Missouri v. Holland, 252 U. S. 416, 433.
(37) Ibid., 433.
(38) Ibid., 434, 435.

(39) Holmes v. Jennison, 14 Pet. 540, 569; Holden v. Joy, 17 Wall. 211, 243.
(40) Billings v. U. S., 232 U. S. 261, 282.

the Supreme Court is firmly committed. The framers of the Constitution of course did not intend to cripple the national government in the exercise of its sovereignty in dealing with other nations. Unhappy experiences under the Confederation had demonstrated the necessity of giving strength to the hand to which was committed our foreign relations. Probably for this reason the affirmative reservation to the Federal government was supplemented by an explicit denial to the States.

Great as are the five specific powers of the President already discussed, greater still is the authority conferred upon him by the first section of Article II of the Constitution. That makes him the residuum of all power that is executive which under our system the Federal government of right may exercise. Whatever is executive in its nature is by virtue of the Constitution itself vested in the President. Congress is without lawful authority to deprive him of it. This is the real source of the power of the President to discharge executive officials; to prevent physical connections with the shores of the United States; to protect the public domain or other public property of the United States; to do whatever else may be of executive nature that is left uncared for by the Constitution or by the statutes of the United States.

In the early years of the government it was vigorously contended that the enumeration of specific powers was a limitation upon the general power of the executive. As in many other controversies with the legislative branch the first positions taken by it were subsequently abandoned or modified. In this instance, however, we have an adjudication satisfactorily settling that the executive power is not limited by enumeration. In determining the effect of the substantially identical wording of the judiciary article of the Constitution the Supreme Court [42] has held that the enumeration is not a limitation.

(41) I, 10; II, 2; VI.
(42) Kansas v. Colorado, 206 U. S. 46, 81-3.

It is to be noted in this connection that by virtue of the limitation in the legislative article of the Constitution of the powers of Congress to those that are therein granted the method for ascertaining whether Congress has power is wholly different from that by which it is ascertained whether the executive or the judiciary has power over or with respect to a particular matter. The Congress has only the powers that are expressly granted or necessarily implied from those that are granted. On the other hand, in determining whether the executive has power, the resort is to the laws and customs of our mother country previous to the Constitution to ascertain whether the nature of the power involved is executive. If so, the power to deal with it is by express provision of the Constitution vested in the President—provided that the subject is one with respect to which the national government itself has authority.

Continuously throughout our history from time to time the legislative branch has trespassed or sought to trespass upon the prerogatives of the executive. A few illustrations will suffice.

Following the Civil War Congress enacted a statute designed to rob Presidential pardons of their efficacy. This was declared unconstitutional by the Supreme Court [43] when A. H. Garland—later Attorney General—applied for readmission to practice before it.

By an Act of March 1, 1919,[44] Congress created a commission—with a majority from its own membership and the remainder designated by it—to which was given "absolute control of and the allotment of all space in" the public buildings—with a few exceptions—occupied by executive officials in the District of Columbia.

Another measure, vetoed by Mr. Wilson,[45] undertook to establish censorship by a committee of Congress of publications by executive officials—even where the mimeo-

(43) Ex parte Garland, 4 Wall. 333.
(44) 40 Stat. 1270.
(45) House Document No. 764, 66th Congress, 2nd Session.

graph, multigraph or similar form of duplication was employed. It prohibited the printing, issuance or discontinuance "by any branch or officer of the government service" of any "journal, magazine, periodical or similar governmental publication" * * * *unless "authorized under such regulations as shall be prescribed by the Joint Committee on Printing."

A further example was in connection with the establishment of the budget system. Mr. Wilson vetoed the bill as originally passed solely because section 303 provided that the Comptroller General and the Assistant Comptroller General should be removable by joint resolution of Congress and in no other manner unless impeached.[46] It was repassed in the same form by the present Congress and signed by Mr. Harding, June 10, 1921.[47] It is believed that this is a plain attempt to usurp an executive right and that if the question ever gets before the Supreme Court it will so hold.

Notwithstanding the proclivity of Congress to stretch its own authority, it has displayed also a tendency to increase the administrative duties of the executive. The validity of these added statutory powers has been sustained even where the nature of the functions to be exercised in many aspects appears to be chiefly judicial or legislative. The courts have held that Congress has authority to vest in the executive the power to make determinations of fact not open to review by the courts and not subject to complaint by the individual where there is no deprivation of the right of trial by jury as it existed when the Constitution was formed.[48] In the same way the courts have held that conditioning the taking effect of legislation upon the ascertainment of a contingency by the executive or authorizing executive officials to make regulations for accomplishing purposes, and in conformity with principles, prescribed by Congress is not a delegation of legislative power.[49] There is a great mass of statutes under which the executive has made regulations of vital influence upon the welfare of citizens—the violation of which is a crime—and under which numerous governmental agencies are daily making decisions of wide import in carrying on business.

The disposition of Congress to confer this power and the action of the Supreme Court in sustaining its validity open a vast field for the future development of administrative law. This form of legislation has been employed recently with increasing frequency. Among the advantages is greater flexibility,—the opportunity more readily to conform to changed conditions by amendment of regulations than by altering rigid provisions of statutes.[50]

Throughout our history the strong men in the White House insistent upon exercising the full constitutional prerogatives of their office have been assailed—generally unjustly. While jealous guarding of their relative functions by the several branches of the government is commendable and the struggle between them is in many ways wholesome, it is believed to be indisputable that the Congress has oftener invaded executive right than the President legislative right. Indeed, it is doubtful if any clear instance of substantial executive trespass on Congressional right can be cited. There is nothing to fear from the past of the executive office. If subject to blame—as at times it has been—generally that was due to its being too yielding to Congress.

The office of the President is entitled to be safeguarded against the criticism—heard recurrently—that its occupant acts as though he were a king. His powers are indeed greater than any monarch possesses

(46) 59 Congressional Record, 8625.

(47) Statutes of the United States, 1921, Chap. 18, pp. 23-4.

(48) Buttfield v. Stranahan, 192 U. S. 470; Meeker v. Lehigh Valley R. Co., 236 U. S. 412; Leach v. Carlile, No. 105, Oct. T., 1921, Sup. Ct., February 27, 1922.

(49) The Brig Aurora, 7 Cranch 382; Field v. Clark, 143 U. S. 649; Buttfield v. Stranahan, 192 U. S. 470; U. S. v. Grimaud, 220 U. S. 506.

(50) Goodnow, Comparative Administrative Law, 27-8.

today. They were deliberately modelled after those of a king. In the light of events it is clear that it would have been unfortunate, if not impracticable, to create the executive which experience under the Confederation had demonstrated was required without vesting in him absolute powers. A sufficient answer to appeals to prejudice is that the plan embodied in the Constitution has worked well for more than one hundred and thirty years—without endangering our liberties. And no more convincing evidence of its wisdom could be asked than the effectiveness with which lately it met the novel emergency of carrying on war over seas.

May the great executive power so far exceed its proper bounds as to become a menace? When executive decisions are political the judiciary uniformly accept them.[51] They deny their jurisdiction to restrain the President even though he undertake to enforce invalid statutes.[52] They hold that it is not the function of the courts to give him directions. Does this augur danger? It is believed not. The remedies afforded by the Constitution itself are adequate.

The President is not above the law. He is subject to removal on his "impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors."[53] If he be guilty of lesser misconduct, recourse may be had to the polls. As a practical matter also both the judicial and legislative branches may bring to bear upon him strong moral or political pressure.

Moreover, so wonderfully devised is the system of checks and balances in our Constitution that the Congress, coming fresh from the people as the result of frequent elections, can always frustrate an arbitrary or capricious President. If he deserve to be frustrated, an enlightened public may be relied on to sustain the Congress in the application of the devices which the Constitution places within its hands. Congress, for example, under some unrelated power of its own or through control of the purse strings may defeat his purposes; or, by a two-thirds vote of each House without the consent of the President, can enact a statute —even one making conduct of executive officials criminal when the objection is serious enough.

Although the courts cannot subject the President to their process, they may restrain his subordinates when individual litigations arise and by that means defeat the execution of his policies if in excess of power. On the other hand, where in the exercise of his constitutional functions he has applied to the courts usually he has had their aid. A notable example is the employment of injunctions to assist him in preventing interference with the movement of the mails or with interstate commerce.[54]

Each of the several departments of the government has genuine functions of right belonging to itself alone and denied to the others. Elsewhere the development has been different. England now is governed by a parliamentary system. The present functions of the king are purely formal. In Switzerland the president is in effect merely chairman of an executive board. In France he is hardly more than a figurehead. In the United States alone of the great countries of the earth has the executive head real power. We may not wholly agree with Judge Simeon E. Baldwin [55] that when the people "gave their assent to the Constitution of the United States, they created in it the office of a king, without the name." But if we disagree, it is not because the power of the President is less than that of a modern king.

The Supreme Court has declared [56] the distribution of governmental powers into three departments, "one of the chief merits of the American system of written con-

(51) Williams v. Suffolk Insurance Co., 13 Pet. 415; Charlton v. Kelly, 229 U. S. 447; Oetjen v. Central Leather Co., 246 U. S. 297, 302.
(52) Mississippi v. Johnson, 4 Wall. 475.
(53) Constitution, II, 4.
(54) In re Debs, 158 U. S. 54.
(55) Modern Political Institutions, 84.
(56) Kilbourn v. Thompson, 103 U. S. 168, 190.

stitutional law * * * and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined." The accomplishment of this design by its framers is one of the principal justifications of Gladstone's pronouncement [57] that our Constitution is "the most wonderful work ever struck off at a given time by the brain and purpose of man."

Notwithstanding the importance and the distinctness of the separate authority of the three departments, demarcation between them is not precise. It is part of the strength of our system that this is true.

By virtue of his right to address Congress and of the necessity of procuring his approval before its enactments can become law without a two-thirds vote of each House the President is vested by the Constitution with power to share in legislation. Thus was devised one of the great co-ordinating factors in our scheme and was further assured the effective exercise of executive power.

That the Federal government is more efficient than the State governments is generally conceded. It is believed that this is due in large measure to the concentration by the Federal Constitution of great executive power in a single official. Only by such concentration is it posssible for the people adequately to exact accountability. The argument that the control of the people is made more effective through direct election of all officials is fallacious. The more diffused the power and the greater the number of officials who have final authority, particularly where they are remote from the mass of the people, the more difficult it is to enforce responsibility. By reason of the vast power of the President, particularly through his authority to appoint and discharge officials and to take care that the laws be faithfully executed, it is possible to put upon him the blame for what occurs through the conduct of his subordinates. The Governor of a State cannot justly be held answerable for the conduct of officials, elected by the people, who are not under his control. The States, through the continual resort of the people themselves to the Federal government for relief, are in increasing measure failing to perform their just shares of the burdens of government and in many way are losing in practice the theoretical rights reserved to them by our system. The fault lies not so much with the officials of the States as with the people who insist on direct choice of so many of their officials.

In their gatherings, as is natural, when problems of government are considered lawyers oftenest dwell upon the judiciary. It is quite as important, however, that they discuss the executive and the legislature. It is their peculiar privilege to be able to inform their fellow citizens as to where power is lodged; to prevent laymen from being misled. As citizens it is appropriate that members of the bar participate in political choices. At the same time they will have wholly failed in their high estate if also they do not guide public opinion and inculcate sound principles of constitutional interpretation. In no aspect of the Constitution can they perform a more signal service today than by bringing about a clearer understanding of the true functions of the executive.

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(57) Bradford, The Lesson of Popular Government, I, 51.

NEGLIGENCE—PUNITIVE DAMAGES

McKENZIE v. RANDOLPH

238 S. W. 828

St. Louis Court of Appeals, Mo., March 7, 1922

Where one drove his car on a dark and foggy night along a public road 18 feet wide at such a dangerous and reckless speed as to indicate a collision which occurred would be the natural and probable result under circumstances detailed in evidence, it would not be error in a suit therefor to submit the question of punitive damages.

NIPPER, C. This is an action for damages alleged to have been sustained by plain-

tiff when an automobile which he was operating was struck by one being operated by defendant, along a public road which runs from Fornfelt through Ancell in Scott county.

The negligence set out in the petition is that, while plaintiff was operating his car at a rate of speed of about 6 miles per hour, along such public road, and at the right of the center of the road, and with his lights burning, defendant's car was being driven in the opposite direction at a very high rate of speed, to wit, 30 or 35 miles per hour, on a rock road about 18 or 20 feet wide, and that defendant "while driving at such a high rate of speed, and failing to keep a proper lookout for others, so recklessly, carelessly, and with such gross negligence and wanton disregard for the safety of plaintiff on said public highway, so operated, drove, and controlled said car that it struck plaintiff's car with such terrific force that defendant's car tore off the left front wheel of plaintiff's car and turned said car around in the road almost facing west."

The evidence offered on the part of plaintiff was that, while he was driving along this public road in his automobile, he was traveling near the right edge of the road, at a rate of speed of about 6 miles an hour. He saw defendant's car approaching him about 2,000 feet away, and, while he was traveling about 300 feet, defendant's car traveled about 2,000 feet. The accident occurred between 6 and 7 o'clock in the evening of November 15, 1918. The night was very dark and foggy. Plaintiff does not undertake to fix the exact rate of speed at which defendant's car was being operated, but says it was coming at a very rapid rate. When his car was struck by defendant's car, the steering wheel was jerked out of his hands, and the front wheel of his car torn off entirely.

Defendant's evidence was that he was driving at a moderate rate of speed, and that plaintiff, when he got near him, turned his car to the center of the road, and ran against defendant's car, thereby causing the injury.

Plaintiff testified that, immediately after the injury, defendant stated to him that he did not see him, and asked him if his lights were burning, at which time he stated to defendant that they were burning when he was struck, and were still burning.

Instruction No. 1, given for the plaintiff, is as follows:

"The court instructs the jury that if you find and believe from the evidence in this cause that on the 15th day of November, 1918, there was a public highway in the county of Scott, leading from the city of Fornfelt to the town of Ancell, in said county, and that plaintiff was the owner of an automobile and was driving said automobile on said public highway, and that defendant was the owner and was operating an automobile on said public highway, and if you further find and believe from the evidence that plaintiff and defendant were traveling in opposite directions about one-quarter of a mile west of Fornfelt on said public highway, and that when plaintiff saw defendant approaching him, he turned his automobile to the right of the center of said highway, and that defendant, *without sounding his horn or other signal device and* at a dangerous and excessive rate of speed, carelessly and negligently drove his said automobile into the automobile of the plaintiff, breaking off the front left wheel and otherwise damaging plaintiff's car, then your verdict should be for the plaintiff." (Italics the Courts.")

The jury returned a verdict in favor of plaintiff for both actual and punitive damages.

There are only two questions presented for our consideration by this appeal. It is urged: First, that instruction No. 1 was erroneous, because it submitted facts to the jury not raised by either the pleadings or the evidence; and, second, that there is no evidence authorizing the submission of the question of punitive damages.

We will dispose of these questions in the inverse order. If defendant was driving his car on a dark and foggy night, along a public road 18 feet wide, at such a dangerous and reckless rate of speed as to indicate that such an accident as happened would be the natural and probable result of such wanton and reckless driving, under such circumstances as are detailed in plaintiff's evidence, then it would not be error to submit the question of punitive damages to the jury.

In Reel v. Consolidated Investment Co., 236 S. W. 43, loc. cit. 46, our Supreme Court said:

"Ordinarily such damages are not recoverable in actions for negligence, because negligence, a mere omission of the duty to exercise care, is the antithesis of willful or intentional conduct. Raming v. Railroad, 157 Mo. 477, 57 S. W. 268; Bindbeutal v. Railway, 43 Mo. App. 463. But an act or omission, though properly characterized as negligent, may manifest such reckless indifference to the rights of others that the law will imply that an injury resulting from it was intentionally inflicted. McNamara v. Transit Co., 182 Mo. 676, 81 S. W. 880, 66 L. R. A. 486; Railroad v. Arms, 91 U. S. 489, 23 L. Ed. 374. Or, there may be conscious negligence tantamount to intentional wrongdoing, as where the person doing the act or failing to act must be conscious of his conduct, and, though having no specific intent to injure, must be conscious, from his

knowledge of surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury'

The other error urged by defendant presents a more serious question. That part of the instruction italicized, which submitted to the jury the question of defendant's failure to sound his horn or other signal device, submitted a question to which no reference is made, either in the pleadings or the evidence. There is no statement in the petition which could possibly be distorted into an inferential allegation that defendant failed to sound his horn or other signal device; neither is there the slightest proof of such fact, or any reference thereto in any of the evidence. Plaintiff argues here that, as the instruction was not in the disjunctive, but in addition to that fact the jury must find all the other facts necessary to a recovery, this requirement relative to the sounding of the horn or other signal device should be treated as surplusage and harmless error because it only required plaintiff to assume an additional burden which was not necessary.

Plaintiff is not without some authority to sustain him. The case of McIntyre v. St. Louis & San Francisco Ry. Co. (Mo. Sup.), 227 S. W. 1047, loc. cit. 1052, lends some weight to plaintiff's contention. However, it appears in that case that the acts of negligence submitted by the instructions were alleged, inferentially at least, in the petition. It is a well-established rule of law in this state that the instructions cannot be broader than the pleadings and the evidence, but must be within the purview of both. This instruction submits a distinct act of negligence not embraced within the purview of either the pleadings or the evidence. Notwithstanding it places an additional burden upon plaintiff, the fact that the jury were required to find that the defendant failed to sound his horn or other signal device may have led the jury to conclude, that, as defendant had made no denial of any such fact, they would be authorized to find that he was liable because he did not negative this question by any offer of proof. And if this jury would find one fact of which there was no proof, and which the court told them they must find in order to entitle plaintiff to recover, and they found for plaintiff, then they found such fact without any proof being made, and therefore must have been misled. The court has no power or authority to change by instructions the issues, which the pleadings present. Bank v. Murdock, 62 Mo. 70, loc. cit. 73.

The instruction broadened the issues as made by the pleadings and the evidence, and should not have been given. State ex rel. National Newspapers' Association v. Ellison (Mo. Sup.), 176 S. W. 11; Degonia v. Railroad, 224 Mo. 564, loc. cit. 589, 123 S. W. 807.

The issues made by the pleadings are the only issues which should have been instructed upon. State ex rel. v. Ellison, 270 Mo. 645, 195 S. W. 722.

For the error above noted, the Commissioner recommends that the judgment be reversed and the cause remanded.

PER CURIAM. The foregoing opinion of NIPPER, C., is adopted as the opinion of the court.

The judgment of the circuit court is accordingly reversed, and the cause remanded.

ALLEN, P. J., and DAUES, J., concur.

BECKER, J., dissents, and as he deems the decision herein contrary to the decision of the Supreme Court in McIntyre v. St. Louis & San Francisco Railway Co., 227 S. W. 1047, and cases cited therein, he requests that the case be certified to the Supreme Court, which is accordingly done.

NOTE—*Punitive Damages as Recoverable in Negligence Cases.*—As there are a great number of cases dealing with this subject we will not cite them, and we will not attempt to reconcile them. It is sufficient to lay down the general rules applicable which we quote from 8 R. C. L., page 588, sec. 133, as follows:

"As a general rule exemplary damages are not recoverable for mere negligence, or for a mere omission of duty. It has frequently been held that such damages may be allowed where the injury complained of is the result of gross negligence, although many of the authorities declare that mere gross negligence is not enough to warrant their allowance. But the apparent conflict on this point is rather a quixotic clash of definitions than of substantial different principles, for it is clear that negligence, as a basis for exemplary damages, must be accompanied with circumstances of aggravation, and where, under the law or the decisions of the particular jurisdiction, this condition finds adequate expression in the term 'gross negligence,' such negligence is a sufficient basis of exemplary damages; otherwise it is not. The rule is that recovery is permitted in, and confined to, cases where the negligence is willful, or where it is so gross as to indicate wantonness or malice,—in other words, it may be fairly termed gross negligence."

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1. **Automobiles**—Contributory Negligence.—Where there is no testimony to justify a finding that a vehicle driver knew, or had reasonable ground for knowing, boys were, or were likely to be, sledding on a hill at the time of passing at right angles thereto, and a sled, not under control, comes rapidly without warning or opportunity to apprehend its approach, he is not liable for injuries resulting from a collision; but, where he could see children at least 50 feet away from the crossing, or knew they were sliding on the hill, he must give warning of his approach, and take other reasonable means consistent with the circumstances to guard against accident.—Idell v. Day, Pa., 116 Atl. 506.

2.——Liability of Owner.—A father who has purchased an automobile for the use of the members of his family is not liable for injuries caused by the negligence of a son while using the automobile without the father's knowledge, though with his implied permission, for the son's own purposes.—Myers v. Shipley, Md., 116 Atl. 645.

3.——Negligence.—Where deceased stood on the running board of an automobile after having been invited to sit in the rear seat, and was thrown off and in front of a truck when the automobile turned to the right to avoid a collision, the night being dark and the truck having no lights, the automobile traveling at the rate of from 25 to 30 miles an hour on the wrong side of a curve, held, that deceased was guilty of negligence, concerning which reasonable men could not differ.—Smith v. Ozark Water Mills Co., Mo., 238 S. W. 573.

4.——Railroad Crossing.—Truck driver, traveling two miles an hour and proceeding to cross obscured track after approaching electric railway car traveling thirty miles an hour had been visible for 500 feet, held guilty of contributory negligence as a matter of law.—Cassidy v. Fonda, J. & G. R. Co., N. Y., 193 N. Y. S. 250.

5.——Railroad Crossing.—Where two experienced drivers in charge of plaintiff's automobile truck proceeded to cross defendant's railroad track without looking for a train approaching in plain view after leaving a point 45 feet from the track until the truck had reached a point too near the track to be stopped, they were guilty of negligence as a matter of law under the law of Kansas, and no recovery could be had, though defendant was negligent in failing to give the statutory signals.—Neosho Grocery Co. v. St. Louis-San Francisco Ry. Co., Mo., 238 S. W. 514.

6.——"Under Influence of Liquor."—Where intoxicating liquor has so far affected the nervous system, brain, or muscles of the driver of an automobile as to impair to an appreciable degree his ability to operate an automobile in a manner that an ordinarily prudent and cautious man in the full possession of his faculties using reasonable care would drive a similar vehicle under like conditions, the driver is "under the influence of intoxicating liquor," within St. 1919, p. 214, § 17, denouncing the driving of an automobile while "under the influence of intoxicating liquor."—People v. Dingle, Cal., 205 Pac. 705.

7. **Bankruptcy**—Assignment.—A petition by the trustee in bankruptcy, setting forth a claim to wages earned by the bankrupt under an assignment of such wages, which the trustee alleged was void, because an evasion of the usury statute, presents a 'controversy arising in bankruptcy," reviewable by appeal.—Tennessee Finance Co. v. Thompson, U. S. C. C. A., 278 Fed. 597.

8.——Dividing Claim.—A single claim against an alleged bankrupt may not be divided, for the purpose of making the requisite number of petitioning creditors; but the mere fact that the claims of two of the petitioning creditors are based on trade acceptances received from the same source does not invalidate the petition.— In re Glory Bottling Co., U. S. D. C., 278 Fed. 625.

9.——Filing of Claims.— The provision of Bankruptcy Act, § 57n, that claims shall not be proved subsequent to one year after adjudication, is a limitation, and does not preclude the court from fixing a shorter time within which claims must be proved, as in proceedings looking to a dismissal of the petition, as provided in section 59g, in which case the court may require all creditors scheduled and notified to prove their claims before the hearing.—In re Rouden Mfg. Co., U. S. D. C., 278 Fed. 663.

10.——Homestead.—The fact that the holders of notes in which the bankrupt waived his homestead exemption had had receivers appointed by the state courts of such homestead property after the bankrupt claimed his exemption, but within the twenty days for objections by creditors, does not prevent the bankrupt from thereafter amending his schedule, so as to renounce his homestead claim and return the property for administration by the court of bankruptcy.—In re Bowers, U. S. D. C., 278 Fed. 681.

11.——Imprisonment. — The commitment of a bankrupt for contempt, under Bankruptcy Act, § 2(13), being Comp. St. § 9586, to enforce obedience to an order to pay funds to the trustee, should cease whenever it appears that obedience to the order cannot be secured by that means, so that further imprisonment is useless, since the bankrupt should not be subjected to an indefinite imprisonment without the sanction and support of the verdict of a jury.—In re Nevin, U. S. C. C. A., 278 Fed. 601.

12.——Right of Action.—Where the trustees in bankruptcy of a dredging company claim to have succeeded to a right of action for injury in collision to a dredge owned by the company, a court of admiralty in which are pending suits to enforce liens against the dredge will not interfere on behalf of the lienors with the prosecution of such suit or with the primary right of the court of bankruptcy to dispose of the proceeds.—The Boston, U. S. D. C., 278 Fed. 623.

13. **Banks and Banking**—Deposit.—Where plaintiff's agent deposited money to her credit, and the passbook was made out in her name, he had no authority, without her knowledge or consent, to withdraw such deposit, although the passbook was in the agent's possession, and plaintiff never notified the bank not to pay the deposit to him.—Goodloe v. Fidelity Bank, N. C., 111 S. E. 516.

14.——Failure to Transmit.—The measure of damages, for failure of Paris branch of defendant bank to pay to plaintiff's assignor a certain number of francs deposited with it for the account of plaintiff's assignor with the London branch, was a sum sufficient for the purchase of the pounds sterling equal to such number of francs at the time it refused to honor plaintiff's demands, together with interest from such date to the time of entry of judgment.—Hoppe v. Russo-Asiatic Bank, N. Y., 193 N. Y. S. 250.

15.—Indorsements.—As between a bank and its customers, the general rule is that, in order to charge the account of a depositor, a bank must pay a check only to the payee named, or his order, and payment made otherwise is at its peril, unless it can claim protection upon some principles of estoppel or negligence chargeable to the depositor.—City of St. Paul v. Merchants' Nat. Bank, Minn., 187 N. W. 516.

16.——Interest Bearing Certificate.—A deposit in a bank for which a certificate was issued bearing interest at the rate approved by the bank commissioner is not rendered invalid nor taken out of the protection of the state guaranty fund because

it was solicited by a third party not the agent of the bank, and who, to advance his own interest, paid the depositor a bonus to procure the making of a deposit. Farm Mortgage Trust Co. v. Wilson, Kan., 205 Pac. 610.

17.—Special Deposit.—A bank may apply to the depositor's note to the bank his general deposit, but cannot apply a special deposit.—Craig v. Bank of Granby, Mo., 238 S. W. 507.

18.—**Bills and Notes**—Oral Agreement.—A note and contemporaneous oral agreement providing for renewal, subsequently reduced to writing in pursuance thereof, while the note was subsisting must as between the parties or those standing in their place or chargeable with notice of the contemporaneous agreement, be considered together as if one agreement; the writing relating back to the time of the execution of the note and being supported by the same consideration.—National City Bank v. Kirk, Ind., 134 N. E. 772.

19. **Carriers of Goods**—Delivery.—In seller's action against buyers for goods shipped and consigned to buyers, but which buyers denied having received from carrier, it was proper to make the carrier a party defendant.—Acme Mfg. Co. v. Tucker & Nobles, N. C., 111 S. E. 525.

20.——Failure to Deliver.—Where a carrier fails to deliver goods at destination, section 2798 of the Civil Code of 1910 confers jurisdiction of the case for resulting damage on the courts of the county where the failure to deliver occurred—that is, the county of the destination of the goods—whether the action be ex contractu or ex delicto. Civ. Code 1910, § 2798. The failure to deliver at destination, or to deliver in good order, is a breach of the contract of carriage, and also a breach of the carrier's public duty, the latter being a tort, both theoretically located at the place of performance, the destination of the shipment.—Davis v. Siegel, Ga., 111 S. E., 439.

21.——Sight Draft.—Where a bank to which sight draft on buyer, accompanied by order for delivery of a carload of potatoes, was sent for collection by a bank which bought the draft, with duplicate bill of lading and order for delivery, turned over the order to the buyer without collecting the draft, thereby enabling buyer to obtain possession from the carrier without payment of the purchase price, the bank was guilty of conversion, and was liable to the transmitting bank for the loss sustained, and could not defend its action in so doing on the ground that it merely intended to afford the buyer an opportunity to inspect goods, not having been instructed to accord him such privilege.—First Nat. Bank v. Farmers' Sav. Bank, Iowa, 187 N. W. 474.

22. **Carriers of Passengers**—Proximate Cause of Injury.—Carrying a street car passenger a few feet beyond the street intersection was not the proximate cause of injuries caused by depression in street after the passenger had voluntarily and safely alighted.—Morris v. Omaha & C. B. St. Ry. Co., Iowa, 184 N. W. 510.

23. **Commerce**—Interstate.—While an interstate shipment within rule 8-B, making it the duty of the consignee to unload, is in interstate transit from loading to unloading point, it ceases to be such when placed under consignee's control for unloading, and in an action for injury to a consignee called upon by the conductor of the train, in accordance with the prevailing custom, to assist in unloading a heavy machine, it was not error to refuse an instruction that would have presented the case as one governed by Employers' Liability Act, § 4.—Baltimore & O. S. W. R. Co. v. Burtch, Ind., 134 N. E. 858.

24. **Corporations**—Corporate Meeting.—A meeting of all stockholders may constitute a corporate meeting, notwithstanding lack of notice, informality, and failure to make a written record, if it was so intended.—Barnett v. Joseph Mayer & Bros., Wash., 205 Pac. 396.

25.——Creation of.—Under Rev. St. 1919, § 10151, providing for incorporation for any purpose intended for profit or gain not otherwise especially provided for, a corporation could be organized for the purposes of buying, selling, holding, and dealing in real estate as a business.—Sylvester Watts Smyth Realty Co. v. American Surety Co., Mo., 238 S. W. 494.

26.——Doing Business in State.—Where a foreign corporation did not have any resident agent or any office or branch house or place of business in the state, but the sales manager visited the state to transact business with plaintiffs, the corporation was "engaged in business in this state" within Civ. Code Prac. § 51, subd. 6, and could be served, under such statute, by service of summons on such sales manager, while within the state seeking to effect a settlement with plaintiffs, the sales manager being its "agent" or "person in charge of such business" within such statute.—Moore v. Racine Rubber Co., Ky., 238 S. W. 381.

27.——Knowledge of Officers.—Where general officers of a corporation had acquired, before their appointment, knowledge of dangerous conditions at the plant, and had such knowledge present in their minds when they were acting for the corporation, their knowledge is attributed to it.—Blue Diamond Plaster Co. v. Industrial Accident Com'n., Cal., 205 Pac. 678.

28.——Service of Process.—If Rev. St. 1919, § 2746, was construed to permit service upon a foreign corporation by delivery of a copy of a writ upon a traveling salesman simply in the state to solicit orders, it would constitute an unlawful restriction on interstate commerce.—Bauch v. Weber Flour Mills Co., Mo., 238 S. W. 581.

29. **Constitutional Law**—Classification. — Proper classification for the purpose of police regulation does not violate any constitutional equality right, and an ordinance requiring an annual license fee from street vendors is not invalid because it imposes a license on middlemen, and excludes from its provisions those who produce the products they vend.—Hughes v. City of Detroit, Mich., 187 N. W. 530.

30.——Due Process.—The act of the Legislature approved August 17, 1918, which provides for statewide tick eradication, is not unconstitutional because it violates the due process clause of the federal Constitution and a similar provision in the state Constitution, in that it does not give the owners of cattle notice and an opportunity to be heard in opposition to their quarantine and dipping for such purposes; and said act is not unconstitutional (a) because it violates the Fifth Amendment to the federal Constitution, (b) because it violates article 1, § 1, par. 2, of the Constitution of this state, and (c) because it violates the fourth paragraph of said article and section.—Rowland v. Morris, Ga., 111 S. E. 389.

31. **Covenants**—Building Restrictions.—Where it was shown that a general plan of building a certain kind of residence had been followed on the lots of a subdivision, the purchaser of two lots was limited by the prevailing restrictions, although the restrictions on one lot limited its buildings only to residence purposes.—Harly v. Zack, Mich., 187 N. W. 533.

32.——Restrictive.—Where a tract was divided into lots which were thereafter sold according to the map and the restrictions contained in a declaration of restrictions, the violation of the restrictive covenant may be restrained at suit of any one who owns property in the tract, or for whose benefit the restriction was established, regardless of whether there was privity either of estate or of contract between the parties.—Chesebro v. Moers, N. Y., 134 N. E. 842.

33. **Damages**—Loss of Earning Power.—That a person injured through the negligence of another was not a wage-earner prior to the accident will not prevent a recovery for loss of earning power.—Zimmerman v. Weinroth, Pa., 116 Atl. 510.

34. **Divorce**—Grounds For.—Under Ky. St. § 2118, authorizing either divorced party to remarry, but prohibiting more than one divorce to any party, except for adultery or other cause for which a divorce may be granted to both husband and wife, and section 2120, allowing cancellation of a divorce on joint application of the parties, but prohibiting a second divorce thereafter on the same ground, a wife who had procured a divorce on the ground of cruelty and had thereafter remarried her husband cannot have a second divorce from him on the same ground.—Penick v. Lewis, Ky., 238 S. W. 744.

35. **Gas**—Service Charge.—A service charge by a gas corporation, though based on the cost of installing and repairing meters, but not on the value of the meters, is not a charge for the rent of

meters contrary to Transportation Corporations Law, § 66, since "rent" is the periodic return for the privilege of use, and, though there may be rents which will not yield a profit, profit within the limit of capacity is typically and normally the end and aim of the exaction of rent.—City of Rochester v. Rochester Gas & Electric Corp., N. Y., 134 N. E. 828.

36. **Highways**—Sinking Fund.—Failure of Pub. Loc. Laws 1919, c. 173, creating highway district, and authorizing issuance of bonds for construction of roads, to provide for the creation of a sinking fund, and to authorize a tax levy for sinking fund purposes, did not affect the validity of the bonds. —Cooper v. Board of Com'rs, N. C., 111 S. E. 521.

37. **Homicide**—Reckless Driving.—In a prosecution for manslaughter caused by criminal negligence in driving an automobile on the wrong side of the road without reasonable care, contrary to C. S. §§ 2617, 2618, evidence of such recklessness as is incompatible with a proper regard for human life or limb or that the injury was likely to occur under the circumstances, is sufficient for conviction, though the speed limit was not violated; the commission of a dangerous act which is in itself a violation of a statute intended to prevent injury to the person constituting manslaughter at least, when death of another ensues.—State v. Jessup, N. C., 111 S. E. 523.

38. **Insurance**—False Statements.—An insurance company cannot defend an action to recover on a life insurance policy on the ground of false representations by insured as to the condition of his health, where it fails to prove a proper legal tender of return of the premiums paid by insured.—State Life Ins. Co. v. Pletcher, Ind., 134 N. E. 876.

39.——Incontestable Clause.—The construction of an incontestable clause in an insurance policy delivered at insured's residence in another state, the law of which was pleaded and proven, must be determined under the law of that state only. —Lavelle v. Metropolitan Life Ins. Co., Mo., 238 S. W. 504.

40.——Proof of Loss.—If an insurance company denies all liability and the insured relying upon such a denial omits to file a proof of loss as required by the terms of the policy, the company will be deemed to have waived such proof.—Russell v. Granite State Fire Ins. Co., Me., 116 Atl 554.

41. **Intoxicating Liquors**—Common Nuisance.—A single sale of intoxicating liquor on premises, accompanied by the unlawful possession of other liquor theron, is sufficient to warrant the granting of an injunction under National Prohibition Act, tit. 2, § 22, for maintenance of a common nuisance.—United States v. Ellert Brewing & Beverage Co., U. S. D. C., 278, Fed 659.

42.——"Moonshine Still."—A garden, within a few feet of a dwelling house with cleared fields surrounding it, and in full view of a public road and traveled public passway, the former within 100 yards and the latter within 50 yards, it not a desert, secluded, hidden, secret, or solitary place away from the observation of the general public, within the meaning of section 37, c. 108, Acts 1919, which probihits the manufacture of spirituous liquors by moonshine still.—State v. Cook, W. Va., 111 S. E. 595.

43.——Warrant.—Under National Prohibition Act, October 28, 1919, tit. 2, § 25, providing that "it shall be unlawful to have or possess any liquor * * * intended for use in violation of this title, * * * and no property rights shall exist in any such liquor," a prohibition agent held to have authority to arrest without warrant a person found on the street with whisky on his person, and to search him and seize such liquor; and such person held to have no right to the return of such liquor which may be retained and used as evidence again him.—United States v. Snyder, U. S. D. C., 278 Fed. 650.

44. **Judicial Sales**—Authority to Sell.—The purchaser at a judicial sale is not required to see that the officer has "complied fully" with the regulations prescribed in such cases. Irregularities create questions and liabilities between the officer and the parties interested in the sale. The innocent purchaser is bound only to see that the officer has competent authority to sell, and that he is "apparently" proceeding to sell under the prescribed forms.—Gower v. New England Mortg. Sec. Co., Ga., 111 S. E. 422.

45. **Landlord and Tenant**—Option to Renew.—Where a lease gave the tenant an option to renew for a similar term at the expiration of the specified term, that option is not exercised merely by the tenant holding over after the expiration of the original term, without some affirmative act indicating an intention to renew.—Branagen v. Winders & Alm, Iowa, 187 N. W. 440.

46.——Rent Laws.—Where a tenant of premises, consisting of a store on front and living rooms in the rear, having separate entrances for the living rooms and for the store, held over, the landlord was entitled to recover possession of the part used for a store, since a lease of combined store and dwelling premises is divisible under the Rent Laws. —Morgenroth v. Emert, N. Y. 193, N. Y. S. 305.

47.——Rent Laws.—The rent laws have no application to property rented for business purposes. —Bard v. Fried, N. Y., 193, N. Y. S. 303.

48. **Master and Servant**—Fellow Servant.—An employe of the owner of a sawmill plant, injured by the fault of a fellow servant, who receives such injury while engaged in the duty of loading logs on a saw carriage used in such plant and in keeping the tracks of such saw carriage cleaned off, which saw carriage is propelled by steam and lever power and is moved back and forth on wheels which run on tracks in the process of sawing logs into lumber, who sues his employer for such injury, does not come within the protection of chapter 194, Laws of 1908, the statute abolishing the fellow-servant rule as to injuries received by employes operating railroad, because such saw carriage is not a "railroad" within the meaning of said statute, but a piece of machinery which is a part of the sawmill plant proper.—Sims v. National Box Co., Miss., 91 So. 194.

49.——Liability of Master.—Where a boy six years of age climbs upon a moving wagon, and while riding thereon the driver, without stopping and putting the child off, strikes at him with a whip, and the boy in his fright and haste in jumping off the wagon catches his foot in a chain and is injured, the owner of the wagon is liable in damages.—Lafferty v. Armour & Co., Pa., 116 Atl. 515.

50.——Negligence.—A street car company is not relieved of a charge of negligence for furnishing car equipped with a defective air brake by the fact that the hand brake, which was intended for ordinary use, but only for emergencies, was in good order, where the air brake would sometimes operate and sometimes not, so that it was a lure to situations of peril.—Schneider v. St. Joseph Ry., Light, Heat & Power Co., Mo., 238 S. W. 468.

51. **Municipal Corporations**—Automobile Insurance.—Under Rem. Code, 1915, § 6059-83, an automobile insurance exchange, authorized by its certificate from the insurance commissioner to write insurance "in classes named as follows: Class 5, fidelity and surety insurance authorizing the issuance of motor vehicle bonds, required by Laws 1915, p. 227, and class 13½, motor vehicle insurance, all hazards (interinsurance plan)," held authorized to write not only the surety insurance called for by Laws 1921, p. 341, § 5, but also liability insurance therein called for.—State v. Kuykendall, Wash., 205 Pac 392.

52. **Sales**—Conditional Buyer.—A vendee of goods under a contract that reserves title in the vendor until payment is made intending, at the time of the purchase, with the knowledge of the vendor, to resell the goods, has the power to dispose of them to a bona fide purchaser or incumbrances without notice free from any claim of his vendor thereto.—Citizens' Sav. & Inv. Co. v. Hunt's Garage, Miss., 91 So. 133.

53.——Delivery.—Under contract for sale of sugar at specified price, "f. o. b. New York, plus ruling New York prepaid freight rates, net cash, payable in Detroit at bank specified below, on presentation of bills of lading supported by invoices," the sellers were liable for the condition of the sugar when delivered to buyer outside of New York, since their obligation as to delivery was not ended at New York, but was not completed until copies of the invoices supported by the bills of lading properly indorsed were presented at the bank, notwithstanding Uniform Sales Act.—W. H. Edgar & Son v. Imperial Ice Cream Co., Md., 116 Atl. 461.